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No. 96-1578

In The

Supreme Court of the United States

October Term, 1996

HON. THOMAS R. PHILLIPS, ET AL.,

Petitioners,

vs.

WASHINGTON LEGAL FOUNDATION, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Amicus curiae, the American Bar Association (ABA), provides its perspective on the following question:

Does interest earned on client trust funds that lawyers hold in Interest on Lawyers' Trust Accounts (IOLTA) constitute a cognizable property interest of the client or lawyer for Fifth Amendment purposes despite the fundamental precept that such funds, absent an IOLTA program, could not earn interest for either?[1]

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[1] The amicus curiae will not, in this brief, address the constitutional issues raised by this question. Instead, based on its unique, national perspective, the amicus curiae will examine the divergence that the Fifth Circuit Court of Appeals' opinion of September 12, 1996 created among the circuits; the evolution of IOLTA in light of the judicial harmony that existed prior to the Fifth Circuit opinion; and the drain on judicial resources, the uncertainty created in the legal profession and the harmful effect on the delivery of civil legal services to indigents nationally that is likely to occur if the divergence is not expeditiously resolved.

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INTEREST OF THE AMERICAN BAR ASSOCIATION

With the consent of all parties to this litigation and upon filing letters of consent with the Clerk of the United States Supreme Court, the ABA respectfully submits this brief as amicus curiae in support of the petition for writ of certiorari.[2]

The ABA is a voluntary membership organization of the legal profession dedicated to the promotion of a fair and effective system for the administration of justice.[3] Its membership includes approximately 342,000 lawyers.

Three of the twelve goals that the ABA has adopted reflect its interest in the matter before this Court:

> Goal I: To promote improvements in the American system of justice.
>
> Goal II: To promote meaningful access to legal representation and the American system of justice for all persons regardless of their economic or social condition.
>
> Goal IV: To increase public understanding of and respect for the law, the legal process and the role of the legal profession.

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[2] Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the American Bar Association. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption of or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

[3] See, American Bar Association Constitution, Article 1, Sec. 1.2.

The ABA has been involved in IOLTA for almost two decades. The simple concept of pooling nominal, short-term client funds in lawyers' trust accounts to generate income, without loss to clients, for law-related public service activities, first appeared in the 1960s in Australia. Innovative efforts to adopt this type of program in Florida, California and Idaho during the 1970s prompted the ABA's interest.

By 1978, the ABA provided information on the development of American and foreign IOLTA programs to interested bar associations, legal services providers and others. In 1981, the ABA formed the Advisory Board and Task Force on Interest on Lawyer Trust Accounts, which reported to the ABA Board of Governors in 1982.[4] In that same year, the ABA Standing Committee on Ethics and Professional Responsibility issued an opinion that examined the ethical implications of a lawyer's participation in an IOLTA program.[5] The opinion concluded that it is ethically permissible for a lawyer to participate in a state-authorized IOLTA program.

Since then, the ABA has supported the creation of IOLTA programs in every state in the nation and has adopted three policy statements in support of IOLTA:

1. A 1983 resolution of the ABA Board of Governors approved the concept of state-authorized IOLTA programs and acknowledged the continuing need for

[4] American Bar Association, *Report to the Board of Governors of the Advisory Board and Task Force on Interest on Lawyer Trust Accounts*, July 26, 1982.

[5] ABA Formal Opinion 348 (1982).

additional funding for civil legal services to the poor and for other law-related public service activities. The resolution supported allocation of funds to reflect the needs and priorities of each jurisdiction.

2. A 1988 resolution of the ABA House of Delegates encouraged states to adopt or convert to a comprehensive IOLTA program, in which all lawyers who maintain client trust accounts would be required to participate.

3. A 1991 resolution of the ABA House of Delegates reaffirmed support for state IOLTA programs and admonished against the use of IOLTA revenues as a substitute for public funding of governmental obligations arising under the U.S. Constitution or other laws.

Today, IOLTA programs operate in 49 states and the District of Columbia.[6] They are a critical part of an indigent civil legal services delivery system that has evolved throughout the United States over the past two decades. State IOLTA programs provide grants in support of equal access to justice through the provision of direct legal services, pro bono services, improvements in the administration of justice and law related education. Their importance has grown significantly in the last two years due to a 30 percent reduction in the budget of the Legal Services Corporation (LSC), the entity providing federal funding for legal services to the poor. As a result, IOLTA

[6] In addition, the Indiana Supreme Court has approved IOLTA in concept, but the program is not yet operational.

programs fund an ever increasing share of civil legal services to the indigent.

The ABA created the Commission on IOLTA and the IOLTA Clearinghouse in 1986. Both monitor and provide information about the operation of IOLTA programs across the country. The ABA is therefore uniquely situated to provide this Court with the history of state IOLTA program development and a national perspective on the implications that this case may have on the ability of poor people to gain access to the nation's civil justice system if the Court does not quickly resolve the issues herein raised.[7]

ARGUMENT

I. By holding that clients have a cognizable property interest in revenues that result from the operation of the Texas IOLTA rule, the United States Court of Appeals for the Fifth Circuit has created a conflict among the circuits and has contradicted every state supreme court that has ruled on this issue.

The United States Court of Appeals for the Fifth Circuit is the only court in the country to find that clients have a cognizable property interest in IOLTA revenues, disagreeing with both the First and Eleventh Circuits[8]

[7] Although the Fifth Circuit remanded the case to the district court, this Court can rule in favor of Petitioners without the need for further factual findings.

[8] *Washington Legal Foundation, et al. v. Massachusetts Bar Foundation, et al.*, 993 F.2d 962 (1st Cir. 1993); *Cone v. State Bar of Florida*, 819 F.2d 1002 (11th Cir.), *cert. denied*, 484 U.S. 917 (1987).

and the seven state supreme courts that have explicitly considered the issue.[9] In addition, forty-four of the fifty operational IOLTA programs in the United States, including the Texas program, were created by state supreme courts.[10] These courts either explicitly or implicitly found that clients have no cognizable property interest in the interest that IOLTA accounts generate.[11] For the past sixteen

[9] *In re Interest on Trust Accounts*, 402 So.2d 389 (Fla. 1981); *Petition of Minnesota State Bar Association*, 332 N.W.2d 151 (Minn. 1982); *Petition of New Hampshire Bar Association*, 122 N.H. 971, 453 A.2d 1258 (1982); *Matter of Interest on Lawyers' Trust Accounts*, 672 P.2d 406 (Utah 1983); *In the Matter of the Adoption of Amendments to CPR DR 9 102 IOLTA*, 102 Wash.2d 1101 (1984); *In the Matter of Interest on Lawyers' Trust Accounts*, 283 Ark. 252, 675 S.W.2d 355 (1984); *Petition by Massachusetts Bar Association*, 395 Mass. 1, 478 N.E.2d 715 (1985). In addition, the California Supreme Court refused to review a consistent decision of the California District Court of Appeals for the Fourth District. See, *Carroll v. State Bar of California*, 166 Cal. App.3d, 213 Cal. Rptr. 305 (Cal. App. 4th Dist.), *cert. denied sub nom., Chapman v. State Bar of California*, 474 U.S. 848 (1985). Although the Indiana Supreme Court, in an opinion on a petition to establish IOLTA by court rule, discussed constitutional aspects of the proposed rule, it did not rule on the constitutional issue. Instead, it rejected the petition because the program would have contravened the state's Rules of Professional Conduct. See, *Indiana State Bar Association's Petition*, 550 N.E.2d 311 (Ind. 1990).

[10] In addition, the IOLTA program in the District of Columbia was created by the District of Columbia Court of Appeals.

[11] The IOLTA programs in the following states operate by authority of a state supreme court order: Alabama, Alaska, Arizona, Arkansas, Colorado, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Mississippi,

years, IOLTA programs, with the participation and/or support of individual lawyers, bar associations, courts and legislatures, have relied on these decisions and rulings to fund such worthwhile law-related public service activities as the provision of civil legal services to those who cannot afford a lawyer.

The prior decisions on this issue share a common and common sense finding: a client whose money is placed in an IOLTA account loses nothing. Before the advent of Negotiable Order of Withdrawal (NOW) accounts, client funds generally were held in non-interest-bearing checking accounts.[12] A client benefitted only if the funds were placed in a separate, interest-bearing account because of their ability to produce income in excess of bank fees and administrative charges. Since it was common for client funds to be nominal in amount or held for a short time, however, lawyers routinely pooled the funds in one non-interest-bearing trust account, as it would have been prohibitively expensive to open and maintain a separate account for each client. Accordingly, the only parties that benefitted from these pooled accounts were the banks.[13]

Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, Wyoming. The IOLTA rule in the District of Columbia was promulgated by an order of the District of Columbia Court of Appeals. The remaining five programs are legislative creations: California, Connecticut, Maryland, New York and Ohio.

[12] ABA Formal Opinion 348 (1982).

[13] *Cone v. State Bar of Florida*, 819 F.2d 1002, 1005 (11th Cir.), *cert. denied*, 484 U.S. 917 (1987).

In the early 1970s, leaders in the legal profession began to examine the possibility of shifting the benefit from the financial institutions to the public. By 1976, after a five-year study, the governing boards of the Florida Bar and the Florida Bar Foundation approved the IOLTA program concept. That work culminated in the adoption of the first American IOLTA program in 1978.[14] In February 1979, the National Conference of Chief Justices adopted a resolution endorsing the Florida program and recommending its introduction in other states.

The implementation of IOLTA throughout the United States did not become possible, however, until Congress passed 12 USC § 1832 in 1980. Commonly known as the Consumer Checking Account Equity Act, it allows financial institutions to pay interest on checking, or NOW, accounts. Five state legislatures, forty-four state supreme courts, including the Texas Supreme Court, and the District of Columbia Court of Appeals have taken advantage of 12 USC § 1832 to put the IOLTA concept into practice.

IOLTA rules either permit or require a lawyer, as fiduciary, to place nominal or short-term client funds (i.e., funds that before IOLTA would have been pooled in a

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[14] *In re Interest on Trust Accounts*, 356 So.2d 799 (Fla. 1978). At the time of this decision, Negotiable Order of Withdrawal (NOW) accounts, the vehicle through which IOLTA accounts earn interest, were approved for operation only in the New England states. At that time, although the Federal Reserve Board of Governors had recommended to Congress that such accounts be made available nationally, Congress had not yet acted. In its decision, the Florida Supreme Court acknowledged that an IOLTA program could not be implemented in Florida until NOW accounts became available in the state.

non-interest-bearing account) in a pooled NOW account. Each lawyer must first assess whether a client's funds are sufficient, or will be held long enough, to produce interest in excess of the bank fees and administrative charges associated with establishing and maintaining an interest-bearing account.[15] IOLTA rules prohibit a participating lawyer from placing in an IOLTA account those client funds that, in the lawyer's best professional and fiduciary judgment, have the potential to generate net interest for the client's benefit. If, however, in the lawyer's judgment, the funds cannot do so, the participating lawyer deposits them in an IOLTA account. In such situations, the enabling state supreme court order or state statute authorizes participating financial institutions to remit the interest to the IOLTA program, which is eligible to be a NOW account beneficiary under 12 CFR § 204.130.[16]

IOLTA programs, therefore, comply with federal law and the ethical rules governing the legal profession. Lawyers, as fiduciaries, can maintain NOW accounts for nominal or short-term client funds that would not generate income for clients, because the recipient of the interest,

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[15] The following factors play a role in the lawyer's assessment: interest rates, available bank products, customary fees and administrative charges prevailing in a given location at a given point in time, and the lawyer's subjective judgment.

[16] Every IOLTA program falls into one of the following categories, each of which is an eligible beneficiary under 12 CFR § 204.130: a bar foundation; an independent 501(c)(3) organization; or an extension or a special program of a state, a state's highest court, or a state bar association. A lawyer, as fiduciary, can maintain a NOW account only if the account's beneficiary is otherwise eligible under 12 CFR § 204.130. See, 12 CFR § 204.130(e).

the state IOLTA program, is always an entity that is otherwise eligible to maintain NOW accounts. The programs also satisfy lawyers' ethical and fiduciary duties to place client funds in a secure account where clients have on-demand access to their money.

After almost twenty years and numerous examinations and reaffirmations of IOLTA's fairness and constitutionality, the Fifth Circuit Court of Appeals' ruling is the first ever to cast substantial doubt on this concept. IOLTA, however, changes nothing vis-a-vis the client: only those client funds that **cannot** earn net interest for the client's benefit can be placed in IOLTA accounts. IOLTA does, however, change much in the lives of the indigent by providing funding for their access to the civil justice system.

II. The failure to resolve promptly the conflict among the circuits will have a negative national impact on the ability of indigents to gain access to the civil justice system, result in a drain on judicial resources and cause uncertainty in the legal profession.

Since its inception, IOLTA has been an important player in the funding of free legal services to persons unable to afford a lawyer. In recent years, its role has become increasingly critical. From the early 1980s to the present, the number of poor people in the United States has grown while federal funding for indigent civil legal services has diminished. In 1981, the budget for LSC was

$321 million.[17] After being reduced to $241 million in 1982,[18] the budget gradually increased to $350 million in 1992,[19] an amount that did not keep pace with inflation and rising costs over the intervening decade. Although funding rose to $415 million in 1995,[20] the 1997 Congressional appropriation for LSC was only $283 million.[21]

As a result, the organized bar has sought other funding sources in order to maintain a minimal level of service by the 281 LSC-funded programs. The vast majority of that additional funding has come from state IOLTA programs.[22] In addition to providing a revenue source for LSC-funded programs, IOLTA provides funding to many other important activities, such as the provision of pro bono legal services, improvements in the administration of justice and law related education.

In its first year of operation (1981), the Florida IOLTA program generated revenues of $1,084.[23] By 1991, however, with fifty IOLTA programs in operation and interest rates at their highest in recent history, income from interest on lawyers' trust accounts grew to $152.7 million nationally.[24] As interest rates declined in the early-and

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[17] Legal Services Corporation, 1982-1983 Annual Report 59.

[18] Ibid.

[19] Legal Services Corporation, 1992 Annual Report 4.

[20] Legal Services Corporation, 1995 Annual Report 3.

[21] See, Pub. L. No. 104-208 (1997).

[22] Legal Services Corporation, *History of LSC, IOLTA, and Non-LSC Funding to Legal Services Programs*, 1994.

[23] ABA Commission on IOLTA, Survey of State IOLTA Program Income.

[24] Ibid.

mid-1990s, IOLTA revenues declined. Nevertheless, in 1995, IOLTA income was approximately $96.4 million.[25]

If the current conflict among the circuits remains unresolved, opponents of IOLTA likely will file lawsuits in other jurisdictions.[26] As each state has a program slightly different from the next, there will be an escalation of IOLTA litigation nationwide, which will force IOLTA programs to defend their structures. The litigation will occur at a time when the federal government has reduced funding for civil legal services to indigents, making other funding sources such as IOLTA more critical than ever. Given the importance of IOLTA nationally, the least productive use of its resources is to defend lawsuits that can be avoided if this Court accepts the petition for a writ of certiorari.

The likelihood of additional litigation being initiated on this issue also makes a quick resolution of this matter necessary to conserve judicial resources. With the uncertainty that the conflict among the three circuits creates, judicial resources in the remaining circuits will likely be called upon to examine IOLTA programs to determine if they pass constitutional muster. As a result, the principle of judicial economy requires a quick resolution of the conflict among the circuits on this issue.

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[25] Ibid.

[26] Indeed, Respondent, Washington Legal Foundation, has filed at least one additional lawsuit against an IOLTA program since the Fifth Circuit rendered its decision. See, *Washington Legal Foundation, et al. v. Legal Foundation of Washington et al.*, Civil Action No. C97-0146Z (W. D. Wash. January 29, 1997).

Hundreds of thousands of lawyers, too, have an interest in a rapid resolution of this issue. They and their bar associations have promoted, supported and complied with IOLTA guidelines, believing that the program is both constitutional and ethically compelled, given lawyers' obligation to ensure that those who cannot afford legal representation receive it. Now, after sixteen years of participation, those lawyers are left not knowing whether their conduct, in fact, is proper. The interests of the legal profession, the judiciary and those who cannot afford access to this nation's civil justice system should persuade the Court to accept, as soon as possible, the petition for writ of certiorari in this matter.

CONCLUSION

State IOLTA programs play a critical role in the funding of indigent civil legal services nationally. After approximately two decades of judicial unanimity that clients are not deprived of property when a lawyer places their funds in an IOLTA account, the Fifth Circuit Court of Appeals has cast substantial doubt on this crucial funding source. A prolonged conflict among the circuits on this issue will result in a drain on judicial resources, confusion in the legal profession and diminished access to this nation's civil justice system for the indigent. For these reasons, the petition for writ of certiorari should be granted.

Dated: May 2, 1997

Respectfully submitted,

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